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No. 63.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

UNITED STATES OF AMERICA, APPELLANT

v.

THE ACME CAN COMPANY.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE ACME CAN COMPANY.

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OPINION BELOW.

The memorandum opinion of the District Court (R. 4) has not been reported.

JURISDICTION.

Whether or not the Government Appeal, taken on April 14, 1936 (R. 5-6), was in time to give this Court jurisdiction, is one of the questions now pre-

sented for decision. The answer to this question depends upon the construction to be placed upon the District Court's actions of March 11, 1936, and April 14, 1936 (R. 4). The applicable statutes are the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (18 U. S. C. A. 682), and Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. A. 345).

QUESTIONS PRESENTED.

1. Whether the action of the District Court on March 11, 1936, was a "decision or judgment * * * sustaining a demurrer" so that the Government's appeal taken on April 14, 1936, was beyond the 30 day period allowed.

2. Whether the manufacture and sale of two-quart metal hampers for fruits and vegetables are prohibited by the Standard Container Act of 1928.

3. If so, whether the provisions of such Act as applied to the facts set forth in the indictment are constitutional.

STATUTES INVOLVED.

The statutes directly involved are printed in Appendix A to the Government's brief, pp. 35-41 in

the case of *United States of America, Appellant,* v. *Resnick,* No. 62, which will be argued with the present case. The provisions of the Standard Container Act of 1916, c. 426, 39 Stat. 673 (15 U. S. C. A. 251 to 256), as well as the clause of the Constitution relating to weights and measures, are set forth in the appendix hereto annexed.

STATEMENT.

The sale charged in the indictment was an intra state sale (R. 2). Appellee's demurrer to the indictment (R. 3) expressly raised the question of the constitutionality of the Standard Container Act of 1928 as applied to the facts set forth in the indictment. The opinion of the District Court holding the Standard Container Act of 1928 inapplicable to the container in this case made it unnecessary for it to decide the constitutional question presented by the demurrer.

On March 11, 1936, the District Court not only filed a memorandum opinion in which it held that its opinion in the *Resnick* case was controlling, but it also in a separate paragraph stated "The demurrer to the indictment is sustained" (R. 4).

No representatives of appellee were in custody nor was it under bond to appear at any time before or after April 14, 1936, when the District Court purported to discharge it (R. 1, 4).

CONTENTIONS OF APPELLEE.

The appellee submits the following contentions:

1. That the action of the District Court on March 11, 1936, when it stated "The demurrer to the indictment is sustained," was a "decision or judgment * * * sustaining a demurrer" as provided for in the Criminal Appeals Act, and the Government Appeal taken on April 14, 1936, was beyond the 30 day period allowed by such Act.

2. That the Standard Container Act of 1928 properly construed has no application to the manufacture or sale of a two-quart metal hamper for fruits and vegetables.

3. That if the Standard Container Act of 1928 be construed as prohibiting the manufacture or intra state sale of a two-quart metal hamper for fruits and vegetables, it is unconstitutional.

ARGUMENT.

I.

THE ACTION OF THE DISTRICT COURT ON MARCH 11, 1936, WAS A DECISION OR JUDGMENT AND THE GOVERNMENT APPEAL ON APRIL 14, 1936, WAS NOT TIMELY.

The narrow question before the Court on this point is whether or not the action of the District Court on March 11, 1936 (R. 4), formally entered of record in the case (R. 1), was a "decision or judgment * * * sustaining a demurrer" as provided for

in the Criminal Appeals Act. If it was, the Government Appeal on April 14, 1936, was not taken within the 30 day period allowed. The action of the Court on March 11, 1936, reads as follows (R. 4):

> "WELSH, *J.*: In view of the similarity between this case and that of the United States of America *vs.* Charles Resnick and Joseph Resnick, partners, trading as L. Resnick & Sons, June Term, 1935, No. 6688, the opinion filed March 11, 1936, in the latter case controls in this case.
>
> "The demurrer to the indictment is sustained."

With all the attention devoted to the question of jurisdiction in the Government's Brief in the *Resnick* case, it appears significant that nowhere in it is the above language set forth verbatim and nowhere is there a forthright argument that such a statement is not a decision or judgment. Government counsel have chosen rather to yield themselves the very matter in controversy by assuming the foregoing to be nothing but an opinion giving the reasons of the Court, from which assumption they then proceed at length to expose the fallacy of regarding mere reasoning of a court as a decision. Appellee agrees that reasoning without a present order is not a decision or judgment and most if not all of Government counsel's argument on this point may be accepted as a correct statement of the law, but the assumption on which it is built is so obviously false as to apparently make it appear inadvisable to the Government to discuss it. This action of the District Court on March 11, 1936,

falls squarely within the definitions given by the Government in its *Resnick* Brief for a decision or judgment. The second paragraph of such action was "so worded as to express the final sentence of the court on the matters contained in the record and to end the case at once, without contemplating any further judicial action," *G. Amsinck & Co.* v. *Springfield Grocer Co.*, 7 F. (2d) 855, 858, (C. C. A. 8th), (Gov't Brief, p. 12—this and all references hereafter being to the Gov't Brief in the *Resnick* case). And to paraphrase another portion of the quotation from the same (Gov't Brief, p. 13):

> "The memorandum claimed to constitute a judgment does * * * purport to be the final judicial act. * * * it does [not] provide that there *shall be* a judgment according to the opinion of the court—[but] * * * that there *is* a judgment by the instrument filed. * * * execution could have been issued thereon— * * * [and an] appeal taken therefrom. It was [not] merely an order for a judgment."

The action of the District Court on March 11, 1936, was both a statement of reasons and a decision. This appears from the separation by paragraphing between the two portions of the Court's action, one giving the reasons and the other the decision, as well as from the fact that the action expressed is in the present tense leaving nothing further to be done. In the latter respect, it is clearly distinguishable from the situation existing in *G. Amsinck & Co.* v. *Springfield*

Grocer Co. (supra), on which the Government chiefly relies (Gov't Brief, pp. 11-13). There the term "judgment accordingly" in light of other facts in the case was interpreted to be prospective in time and not a present judgment of the court. Here the term "The demurrer to the indictment *is* sustained" (Italics ours) cannot by any conceivable argument be regarded as looking to the future. It is specifically expressed as a present action and the only action that it could be was the District Court's decision sustaining the demurrer.

As an appeal statute is under consideration the words "decision or judgment" in the Criminal Appeals Act are used in the sense of *final decision* or *final judgment,* with respect to the subject matter of the appeal. On an appeal under the Criminal Appeals Act the whole case is not open to review in this Court, but only that part involving the invalidity or construction of the statute upon which the indictment is founded, *United States* v. *Keitel,* 211 U. S. 370. In this respect an appeal under the Criminal Appeals Act differs from the ordinary appeal where the whole case is open to review and an appeal cannot be taken except from a final decision, decree or judgment which settles all points in litigation between the parties and permits no further judicial action by the lower court.

With this distinction in mind, it follows that a case under the Criminal Appeals Act has reached an appealable status when the District Court has sustained

a demurrer because of the invalidity or construction of a statute and the action of the Court has been filed by the Clerk. Any orders or decrees that the District Court might thereafter make, either at the instance of the Government or otherwise, would not affect the appealable status of the case or the running of the time for appeal. That there may be orders or decrees of the District Court after the case is ready for appeal, is contemplated by the Criminal Appeals Act which provides that "Pending the prosecution and determination of the writ of error (now appeal) in the foregoing instances, the defendant shall be admitted to bail on his own recognizance." Under this provision the District Court may make an order admitting the defendant to bail after it has rendered its decision on a demurrer. The order of April 14, 1936, entered by the District Court was presumably in accordance with this provision. The appellee is a corporation which of necessity was not in custody and therefore could not be admitted to bail on its own recognizance. However, it could be "discharged without day," which the District Court did in its action of April 14, 1936 (R. 4).

That part of the action of April 14, 1936, which reads "the Demurrer to the Indictment in the above entitled cause be and the same is hereby, Sustained" did not add anything which was not already in the record of this case. The words used are similar in substance to those used by the District Court on March 11, 1936, when it said, "The demurrer to the

indictment is sustained." To conclude that this part of the action of April 14, 1936, is the decision or judgment sustaining the demurrer is not only to overlook and nullify similar words used by the Court on March 11, 1936, but is to say that in each succeeding order, which the District Court may enter in a case, appropriate words may be inserted which again decide the case and start a new period for taking an appeal. Such a conclusion is clearly untenable.

Not only is the foregoing construction of the District Court's action of March 11, 1936, the only reasonable one, but it was the one adopted by the Government itself. The Government petition for appeal (R. 5) states "that on the 11th day of March, 1936, a demurrer * * * was by the Court sustained" and asks for leave to appeal "for a reversal of said judgment and order." The order allowing the appeal (R. 5) was based on this petition. Whether inadvertent or not from its standpoint, this shows the natural interpretation of the District Court's action on March 11, 1936, and the Government's present argument that this was only a clerical error seems one adopted by necessity and not through a logical consideration of the entry.

It follows that the District Court rendered its decision or judgment sustaining the demurrer on March 11, 1936, and the Government appeal taken on April 14, 1936, was not within the 30 day period allowed. On this ground the appeal should be dismissed for lack of jurisdiction.

II.

The Standard Container Act of 1928 Properly Construed has no Application to the Manufacture or Sale of a Two-Quart Metal Hamper for Fruits and Vegetables.

The indictment charged in substance that appellee committed a criminal act both in manufacturing and in selling two-quart metal hampers for fruits and vegetables. No charge was made that such hampers were deceptive in shape or appearance, that they were not of full two-quart capacities, or that they were made for the purpose of sale or sold in interstate commerce. The Government's position succinctly stated is to the effect that no two-quart hamper for fruits and vegetables may be made or sold for use in the United States, and to do either constitutes a federal offense.

We venture to suggest that the bald statement of the Government's position would shock any impartial hearer and that it would be difficult for anyone to believe that it could be a crime against the United States Government to make or sell a full capacity two-quart hamper for fruits and vegetables. Any such contention so restrictive on individual liberties must be carefully scrutinized to see if it necessarily results from the legislation on the subject and if so whether it is permitted by the Constitution. It is submitted that the pertinent legislation provides for no such drastic prohibition and that the District Court was correct in so holding.

In considering the Standard Container Act of 1928 (Gov't Brief, Appendix A, pp. 35-41) the provisions of the Standard Container Act of 1916 (Appendix, *infra,* pp. 24-27) should be noted for their bearing on the questions here raised. This 1916 Act provided, *inter alia:*

> "SEC. 2: The standard basket or other container for small fruits, berries, and vegetables, shall be of the following capacities, namely, dry one-half pint, dry pint, dry quart, or multiples of the dry quart. * * *"
>
> "SEC. 3: It shall be unlawful to manufacture for shipment, or to sell for shipment, or to ship from any State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, any Climax baskets or other containers for small fruits, berries, or vegetables whether filled or unfilled, which do not conform to the provisions of this subdivision of this chapter; * * *"

From the general plan of the two acts it can fairly be said that the 1916 Act dealt with the smaller containers for fruits and vegetables and was restricted to those used in interstate commerce, while the 1928 Act in specifically referring only to containers of four quarts and upward, was directed at the larger sizes and was not by its terms limited to those used in interstate commerce. That there was such general plan of covering the smaller containers by the 1916 Act and the larger ones by that of 1928, is demonstrated by the fact that the 1916 Act

was not only not repealed when the 1928 Act was passed, which would have been done had the latter been regarded as occupying the field for fruits and vegetable containers below the four-quart size, but the 1928 Act expressly exempted specified containers complying with the 1916 Act. This exemption has a real meaning for such containers approved by the 1916 Act as have capacities of over four quarts and thus fall within the express field of the 1928 Act, which fact eliminates any proposed conclusion that the 1928 Act must cover the field below the first size of four quarts mentioned in it in order to give the exemption any reasonable meaning.

Further support for this distinction between the 1916 and 1928 Acts and the contention that the latter was directed at the larger sizes only, is to be gathered from the general tenor of the documents set forth in the Goverment's Brief, Appendix B, pp. 41-59.[1] These show that the discussions over the 1928 Act centered around problems of shipping and deception, neither of which would have any application to the smaller sizes already regulated by the 1916 Act. It seems so apparent that this Court may reasonably

[1] In this connection it is interesting to note that of the many hampers shown in the photograph on p. 51 of the Government Brief as an example of the need of standardization, all lie within the express field of the 1928 Act from four quarts to two bushels with the exception of the five smallest ones at the upper left hand corner. It is impossible to read their capacities from the print, and no list is given, but it seems not unlikely that several at least of these may not be multiples of the dry quart, which would eliminate them under the 1916 Act. This photograph therefore presents a graphic picture of the field sought to be covered and of how little interest there could have been in regulating sizes below four quarts that already were reduced to multiples of the quart by the 1916 Act.

take judicial notice of it, that little if any shipping is done with such small containers as two-quart ones and that a two-quart container is not adapted for any but the smaller fruits and vegetables. And in two places at least specific statements bear out such distinction. In the report of the Chief of the Bureau of Agricultural Economics to the Secretary of Agriculture under date of September 11, 1929 (Gov't Brief, pp. 50 and 53), it was stated:

> "A much larger percentage of the samples of the *large* containers covered by the Act of 1928 have been found to be nonstandard than has been the case with the *smaller* containers covered by the Act of 1916." (Italics ours.)

Again, H. A. Spilman, Senior Marketing Specialist, Bureau of Agricultural Economics, Department of Agriculture, speaking of the 1916 Act, has said (Gov't Brief, p. 54):

> "As put together, its wording was such as to standardize also what we call till baskets and to indirectly affect *larger* containers." (Italics ours.)

Presumably the interstate commerce provision in the 1916 Act resulted from the fact that the smaller containers were regarded as of local concern except to the extent they were used in interstate commerce. The absence of such provisions in the 1928 Act indicates that the containers dealt with were not so regarded, because, as is borne out by the material found at pages 41-59 of Appendix B to the Govern-

ment Brief, the larger sizes more generally enter into interstate trade.

It follows that the 1928 Act was never intended by Congress to apply and does not apply in any way to containers for fruits and vegetables of less than one-eighth bushel (*i. e.* four quarts) and that a two-quart container, if within the field of federal law at all, is governed by the 1916 Act. No violation of the 1916 Act is here charged, not only because the described transactions are not within interstate commerce, but also because appellee's container complies with this Act in terms, being an accurate multiple of the quart.

To conclude otherwise is to put upon the 1928 legislation an unnecessary interpretation that leads to an absurd and arbitrary result. If the 1928 Act be regarded as applying to containers of less than four quarts in capacity, it is unlawful under the Government's contention to make or sell a two-quart hamper for fruits and vegetables, although lawful to make and sell a two-quart Climax basket, berry box or till basket for the same articles. This would be by reason of the express exemption set out in Section 5 of the 1928 Act (Gov't Brief, p. 38). Surely such a ridiculous distinction, based on the mere shape of a container, is to be avoided if it is possible to give the 1928 Act another reasonable construction. It can be given such reasonable meaning by restricting it to the larger size containers of four quarts and upward. As this Court has said in *United States* v. *Katz,* 271 U. S. 354, at p. 357:

> "All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."

The conclusion that the 1928 Act is not applicable to any container smaller than four quarts is further supported by the only decision of this Court relating to it. In *Pacific States Co.* v. *White*, 296 U. S. 176, 183, this Court in referring to the 1928 Act in question said:

> "That statute deals solely with hampers, round stave, and splint baskets of capacity not less than one-eighth bushel."

Perhaps the most significant thing about this statement, asserted by the Government to have been inadvertent and unnecessary to the decision in that case, is the fact that, presumably without being strongly urged on the point one way or the other, this Court adopted a natural and reasonable construction of the 1928 Act, without even a passing remark suggesting that there might be any other. It is submitted that it demonstrates rather concisely the fact that to no one would naturally occur the thought that the 1928 Act covered the field below the lowest limit set in it, particularly in view of the 1916 Act, and that the construction sought by the Government is indeed a tortured one.

III.

CONGRESS HAS NO POWER UNDER THE CONSTITUTION TO PROHIBIT THE MANUFACTURE OR INTRA STATE SALE OF APPELLEE'S TWO-QUART CONTAINER.

The Government, without discussion, attempts to dismiss the constitutional question that must inevitably arise in this case if the interpretation of the 1928 Act sought by it should be adopted (Gov't Brief, pp. 3, 4). If, as the Government contends, Congress has by the 1928 Act made it a crime to either manufacture, or sell intra state, a two-quart hamper for fruits and vegetables, it becomes a most pertinent question as to where in the Constitution Congress was given any such far reaching power. This constitutional question was specifically raised in the original demurrer to the indictment (R. 3), was argued by counsel in their briefs and oral argument before the District Court, and, although unnecessary to the latter's decision after it decided as it did that the appellee's two-quart hamper was not within the field of the 1928 Act, was covered in the District Court's opinion in the *Resnick* case by the statement that "we do not consider that there is any merit in such an objection" (*Resnick,* R. 7). The attempt of the Government to rely on the statement of the District Court that "The issue was so framed in this case that the constitutionality of the Act or the interstate character of the business is not involved" (Gov't Brief, p. 3), in view of the record and proceedings in the case, can better be explained by reluctance on

its part to meet the constitutional question than any real reliance on such an inexplicable statement of the District Court.

The only basis for the District Court's statement was appellee's contention, which is again advanced here, that a limitation of the field of the 1928 Act to the express limits specified in it from four quarts to two bushels does make unnecessary a decision on the constitutionality of the Act as applied in this case. And as was said in *Missouri Pac. R. R.* v. *Boone*, 270 U. S. 466, 471-2:

> "The section, if so construed, would, at least, raise a grave and doubtful constitutional question. Under the settled practice, a construction which does so will not be adopted, where some other is open to us. * * * An examination of the section in the light of the then existing federal and state law will make clear that another and reasonable construction is open to us, and that it should prevail."

But such principle does not cover the Government's argument that the 1928 Act is applicable to the facts in this case and it cannot, on the record here, evade the constitutional issue which its own contentions create, by any pretended reliance on the quoted statement of the District Court.

The 1928 Act is not confined in any way to transactions in interstate or foreign commerce, nor is such element present in this case. Accordingly the power of Congress to deal with the particular subject matter here must be found solely in the weights and measures

provision of the Constitution.[2] The power granted Congress in this field is found in the *Constitution, Article I, Section 8, Clause 5,* reading as follows:

> "The Congress shall have power * * * to * * * fix the Standard of Weights and Measures"

and the *Tenth Amendment* of course restricted Congress to such delegated powers as could be found in the Constitution.

There were no debates in the convention on this clause before its adoption, and this Court has never before had occasion to construe it.[3] The absence of all debate on the clause is a strong indication that no one questioned the wisdom of permitting Congress to set up one standard system of weights and measures for the entire country in the interests of free commerce so that every section could deal with every other on the basis of a common language of mass and amount. It is likewise submitted that had the delegates to the Constitutional Convention ever supposed that the language by which such desire was expressed might be fastened upon to permit the federal government then being created to make criminal

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[2] That the 1928 Act was regarded as based on the weights and measures provision, is indicated by the absence of any interstate or foreign commerce requirement in it, as well as by the fact that upon its introduction the proposed legislation was referred to the Committee on Coinage, Weights and Measures of the House of Representatives (Gov't Brief, p. 27).

[3] The Articles of Confederation of 1777, Article IX, had a similar provision reading as follows:

> "The United States in Congress assembled shall also have the sole and exclusive right and power of * * * fixing the standard of weights and measures throughout the United States."

the manufacture or intra state sale, of an accurate two-quart container, there would have been no lack of denunciation on the subject.

Congress has never adopted any general system of standard weights and measures[4] and it was not until the 1928 Act that the definition of the bushel was made (Gov't Brief, Appendix A, p. 36). Even here the definition was in terms of cubic inches and Congress has never adopted a standard of length. The reason for such inaction seems apparent, the English system of weights and measures was adopted generally in this country by common usage, there were no conflicting systems to interfere with it, and Congress was under no pressure to adopt a uniform system since one already existed in fact.

Now the Constitution does not give Congress the power to *regulate the use* of weights and measures, it only gives Congress the power to *fix the standard* of weights and measures.[5] Therefore, although Con-

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[4] Webster's New International Dictionary (1927) defines the words used in clause 5 as follows:

Fix—To give a permanent form to; to make definite and settled.

Standard—That which is established by authority as a rule for the measure of quantity, weight, extent, value or quality; esp., the original specimen weight or measure sanctioned by government, as the standard pound, gallon, yard, meter or the like.

Weight—A unit of weight or mass; as, a table of weights.

Measure—A unit of measurement, esp. a unit of length, area, or volume.

[5] It is significant that the first suggestion in the Constitutional Convention for a weights and measures provision appeared in a marginal note of Rutledge who proposed that Congress be given power "to *regulate* Weights and Measures," and that this was changed by the time of the final draft to read, "To * * * *fix* * * * the Standard of Weights and Measures." (Italics ours.) *William M. Meigs*, "The Growth of the Constitution," p. 140.

gress could rightly fix the standard of the quart or bushel as a measure of capacity, it is wholly outside its province to determine the extent or method of use of that standard by multiples or fractions, and *a fortiori* beyond the limits of its authority to regulate a *container* for any particular article. The 1928 legislation, if it be interpreted as attempting to prohibit the manufacture or intra state sale of a two-quart hamper for fruits and vegetables, is not the fixing of a standard of capacity but an invalid attempt to regulate a container.

It is agreed that it was desirable to have a uniform system of standard weights and measures in the United States so there would be but one standard dry quart and not a number of different ones which would result in confusion. But once having established a standard for the dry quart as Congress did in the 1916 Act (Appendix, *infra*, p. 25), it exhausted its power and was outside its field in attempting to prohibit the use of any multiple of that standard, irrespective of the beneficial purpose it may have thought it had in mind in attempting to do so.

It may be true that Congress, in being given the power to fix the standard, had the power to drive out other standards that conflicted with it so that there was but one dry quart measure and not a standard quart and a "Smith quart" for example. Even this is doubtful so long as a "Smith quart"

was so designated and not represented to be a standard quart, since Congress was given power to set up a common language for trade, but not given the express power to prohibit the use of any other. It is a far cry from this however to say that Congress could prohibit the use of a two-quart container that is a correct multiple of its own standard quart. The container here has no meaning as a measure apart from its relation and reference to the proper standard used.

Again, assuming for purposes of argument that it is within the power of Congress to prohibit containers which are not quite a quart in capacity so that confusion is apt to result, although this is by no means conceded for all purposes since it is not *fixing* a standard but *protecting* it, such power has no bearing on a direct prohibition against the use of an exact multiple of the standard, a full two-quart container.

The use of the term "standard hamper" in the Act is meaningless since it gives no measure of capacity. It is necessary to add "one-eighth bushel" or other reference to the known standards of capacity before any indication is given of size or amount. And by the same token, a "standard one-eighth bushel hamper" means a measure of capacity solely by reason of the use of the fraction of the bushel as a standard. The 1928 Act, if applied to the facts in this case as asked by the Government, would not be

the fixing of a standard, it would be an attempt to regulate a non-deceptive use of the standard under the guise of creating a new standard. It would indeed be a metaphysical argument to most people to be advised that a six-inch rule is a separate and distinct standard from a rule six inches long just because Congress chose to call it so. It must be concluded that, if the 1928 Act means what the Government says it does, new standards were not being fixed by Congress in the 1928 Act, but old standards were being used in new ways.

To the extent the 1928 Act for the first time defined the bushel and its fractions in terms of cubic inches it was a proper exercise of congressional power, but to the extent it attempted to set up permitted containers and abolish all others it was an invalid attempt to exercise a police power which Congress does not have. If the line of demarcation between *fixing* a standard and *regulating* its use, which appears so clearly in the 1928 Act, as sought to be applied by the Government in this case, is not firmly drawn, then there is no logical limit to the field in which Congress may regulate. Most articles of commerce are dealt in on the basis of weight or measurement, and the key to limitless regulation of local matters by congressional action has indeed been discovered if the innocent weights and measures provision means what the Government does not in terms, but must in fact, contend in this case.

CONCLUSION.

For the reasons given, it is respectfully submitted:

1. That the Government appeal should be dismissed for want of jurisdiction, or

2. That the action of the District Court in sustaining appellee's demurrer to the indictment should be affirmed.

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